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No. 97-391

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

ARTHUR CALDERON, Warden; TEENA FARMON, Warden of the Central California Women's Facility; C.A. TERHUNE, Director, California Department of Corrections; DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

TROY A. ASHMUS, of himself as an individual and on behalf of himself and all others similarly situated, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In urging this Court to deny certiorari, respondent asserts (*1*) that the "apparent" conflict between the Ninth Circuit's construction of the Eleventh Amendment in this case and Fourth Circuit's decision in *Booth v. Maryland*, 112 F.3d 139 (CA4 1997), *petition for cert. filed,* No. 97-5623, "presents no issue of national importance"; (*2*) that because "no conflict" of decision exists at all concerning the application of Chapter 154 in California, that issue is now "unimportant"; and (*3*) that the injunction barring California officials from ever again questioning—in *any* court—the soundness of the lower federal courts' decisions in this case entails no encroachment on those officials' constitutional right and duty to advocate on

behalf of the state's interests, but merely illustrates the federal's judiciary's "inherent" power under the "All Writs Act" to ensure that its decisions will not be "circumvented" by subsequent judicial reconsideration.

A. *The* Booth-Ashmus *Conflict*

Ashmus "declin[ed] to follow . . . *Booth*" (Brief in Opposition ("Opp.") at 6), and the resulting conflict is one of grave constitutional proportions: *Booth* holds that the Eleventh Amendment bars suits brought to enjoin state officials from asserting their views on a question of federal statutory construction, while *Ashmus* deems such suits authorized under *Ex Parte Young* on the theory that state officials' assertions about the state of the law will, *if incorrect*, "irreparably injure" the rights of those who hold opposing views. No "factual" findings (Opp. at 13) underlie this form of hypothesized "injury"; rather, its supposed existence in this case depends entirely on the assumption—the purely *legal* assumption—that the death row inmates' understanding of which "law [will] govern[] federal habeas proceedings" (Opp. at 5) is correct, and that state officials' differing views based on their reading of Chapter 154 are therefore necessarily "false[]." App. 39a.[1] Thus, as the Ninth Circuit noted, "*the basis for the injunction*" is "the district court's *determination that California does not comply with Chapter 154*" (App. 8a-9a

1. The "record" on which this case was ultimately decided consists entirely of *legal* provisions—specifically, those provisions of California law that constitute its unitary review mechanism. Respondent's suggestions to the contrary notwithstanding, the issue is not otherwise "fact-specific," and respondent never introduced one iota of evidence (nor would it matter even if he had) that any death row inmate in California ever took any action, or failed to take any action, on account of anything state officials "asserted" about the applicability of Chapter 154.

(emphasis added)), not any "factual findings about the nature and effect of petitioners' conduct" otherwise. *See* Opp. at 11.

While sensitive to the "importance" of securing "a judicial determination of the law governing federal habeas proceedings" in California (Opp. at 6), respondent sees no "national importance" in identifying, at the outset, the federal constitutional constraints that will affect such efforts in *every* state. That there was a right way and a wrong way of securing a judicial determination in this case hardly made the choice "unimportant," except of course to someone who remains resolutely unattuned to the difference between a court's (*1*) considering (and perhaps even rejecting) the state's views on a disputed legal question that arises in the course of litigation (*see* Opp. at 11 n. 7) and (*2*) enjoining the state (under pain of contempt) from even *expressing* its position to any other court wherein the issue is of equal or perhaps even greater importance.[2]

2. By finally acknowledging that judicial determination of Chapter 154's applicability "may properly be made in individual habeas proceedings" (Opp. at 7; *see also id.* at 16 n. 10 & authorities cited therein), respondent effectively concedes that his suit was not "necessary," and thus that it is not authorized by *Ex Parte Young*. *See* Opp. at 9 (citing *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (quoting *Ex Parte Young* 209 U.S. 123, 160 (1908)); *compare* SER 6 (respondent asserting that his suit provided "the only vehicle" for determining Chapter 154's applicability). By their nature, coercive remedies, as compared with legal remedies, will often prove more "efficient," "effective," and "convenient" for one party; fortunately, however, any actual dispensation of such relief is governed by more exacting standards—especially if the threat of contempt is to be leveled against conduct that is both constitutionally protected and undertaken in furtherance of an important state interest.

The constitutional issue at the heart of the *Booth-Ashmus* conflict requires resolution as urgently as any arising under the AEDPA. Indeed, if a state can be enjoined from expressing its legal positions based on the assumption that its positions are erroneous and thus "injurious" to the civil rights of persons holding some different view, then the Ninth Circuit's decision in this case has ramifications well beyond the habeas context. Even the district court acknowledged as much, but felt the fallout from its own "exten[sion]" of the law could be "limit[ed]" to lawsuits initiated by persons sentenced to death. App. 47a-48a. The Eleventh Amendment contains no "death penalty exception," however, and the Ninth Circuit's single-minded focus on matters of "efficiency" and "cost" (neither of which it accurately assessed) bespeaks no respect for such a "limitation." Respondent, never able to suggest any other limitation, now finds himself reduced to observing that none of the pernicious effects *Ashmus* is sure to generate beyond the capital habeas context has yet to be reported. *See* Opp. at 13.

Given the recency of the Ninth Circuit's *Ashmus* decision, respondent's peek into the advance sheets scarcely demonstrates that the resulting split with *Booth* "presents no issue of national importance." Although the Ninth Circuit initially took *Ashmus* under submission in September of 1996, its published opinion did not issue until August 18th of this year (some four months after the Fourth Circuit issued its decision in *Booth*). By that time, California officials, knowing of the pending certiorari petition in *Booth* and having already suffered under the district court's unconstitutional injunction for nearly a year and a half, prepared the instant petition for filing 16 days later on September 5. Thus, although the state, by acting expeditiously, has done what it can to achieve some modest measure of short-term "damage control," only this Court can ensure the future protection of those values

embodied in the Eleventh Amendment but now imperiled by the Ninth Circuit's refusal to follow *Booth*.

The immediate and widespread impact of the *Ashmus* litigation *within* the habeas context is palpable, respondent's actions having inspired the filing of virtually identical suits by death row inmates in at least three other states. Although the ensuing mischief in Maryland and Pennsylvania was largely brought under control *before* the court of appeals' decision in *Ashmus*, see *Booth v. Maryland*, 940 F.Supp. 849 (D. Md. 1996)(rejecting state officials' Eleventh Amendment defense), *rev'd*, 112 F.3d 139 (CA4 1997); *Death Row Prisoners v. Ridge*, 948 F.Supp. 1258, 1274 (E.D. Pa. 1996)(following district court decision in *Ashmus*), *terminated by "respective declarations of counsel,"* 106 F.3d 35, 36 (CA3 1997), one of the enduring costs of all that litigation is the very intercircuit conflict identified in these proceedings. The problem will not soon go away, *e.g.*, *Hill v. Butterworth*, 941 F.Supp. 1129, 1136 (N.D. Fla. 1996)(following district court decision in *Ashmus*), *appeal pending*, (CA11), and indeed will only recur and intensify as other capital states introduce Chapter 154-qualifying review mechanisms.

B. *Chapter 154*

California offers collateral representation to all death row inmates; makes all such appointments in response to inmate request, by written order, and pursuant to published competency standards; and statutorily guarantees every appointed counsel a reasonable sum for compensation and necessary expenses. Nevertheless, the Ninth Circuit, in a decision faithful to none of the relevant provisions of state or federal law, concluded that California does not qualify under Chapter 154 on account of the state's failure to do things ranging from the imprudent (removing all judicial discretion from the task

of administering counsel standards) to the impossible (completing every appointment of counsel no later than "at the time" it is requested). *See* Opp. at 17-18 & n. 11. Respondent now seeks to insulate that ruling from all further scrutiny by assuring this Court that the Ninth Circuit's decision is "in harmony with every other court addressing the issue." Opp. at 15; *id.* at 8 ("fully conform"); *id.* at 13 ("no conflict"); *id.* at 16 & n. 10 ("unanimously agree").

But the only case to consider *California's* compliance is *Ashmus* itself, and given that both lower courts were concerned with avoiding "divergent . . . opinions" (App. 13a) and "inconsistent adjudications" (App. 57a) to the point of effectively denying any other court the opportunity to pass upon the question (see App. 59a-60a), the absence of any direct "conflict" counts for little. Nor, of course, does the *Ashmus* decision enjoy any meaningful state of "harmony" with cases from Florida (where fair consideration of the issue was also foreclosed by a similar injunction imposed on state officials), or Ohio (where statutory authorization existed for *rejecting* requested representation, the only published counsel standards were concededly *inapplicable* to collateral counsel, and appointments were *not* made by order of any court), or Tennessee (where the *only* standard was bar membership), or Virginia (which extended *no* offers of counsel and whose relevant statute contained "*no* mention of compensation"), or Texas (where there were no written standards *at all*), or Indiana, Illinois, Louisiana, Montana, and Idaho (where claims of compliance were *never even advanced* by the states). *See* authorities cited in Opp. at 15-17 & n. 9.

Respondent suggests that the Ninth Circuit's failure to understand the nature and effect of California's unitary review mechanism might be explained by petitioners' own failure to acquaint the court with some relevant provisions

of state law—including the statutes that expressly guarantee counsel reasonable compensation and authorize all courts to promulgate their own "rules of court." Opp. at 14 n. 8. Although it is apparent that the Ninth Circuit failed to consider a number of key state provisions, it cannot be because they were "not referred to by petitioners in the proceedings below." *Id.; see* (*1*) Cal. Const., art. 6, § 6, *cited and quoted in* Appellants' Opening Brief ("AOB") 51-52 and Respondent's Brief ("RB") 39; (*2*) Cal. Gov't. Code § 68070, *cited in* Appellants' Reply Brief ("ARB") 25; (*3*) Cal. Rules of Court, Introductory Statement, *cited and quoted in* AOB 52; *quoted in* RB 39; and *cited twice more in* ARB 22 n. 10; and (*4*) Cal. Pen. Code § 1241, *cited and quoted in* AOB 11, 53, 56.[3]

Finally, respondent argues that questions about the correctness of the Ninth Circuit's construction of the AEDPA and relevant provisions of California law merit no attention because the state very recently reformed its capital review procedures (effective next year) and thereby issued an "apparent concession" that its existing mechanism does not comport with Chapter 154. The latest legislative action imports no "concession" of any sort; it was taken primarily to address a long-standing concern relating to delays in *state* practice, a concern that substantially predates, and exists quite independent of, the state's interest in expediting *federal* proceedings through application of Chapter 154. In fact, the principal

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3. As for the Ninth Circuit's evident failure to understand that no amount of delay in the appointment of *state* counsel will cause an inmate to be "without counsel" during any portion of the 180-day period permitted for the filing of a *federal* petition (which occurs only after the process has run its course), respondent "submits" that we have "misread the Ninth Circuit's opinion," but suggests no way to construe the court's repeated comments on that subject as anything other than evidence of confusion. *Compare* Opp. at 11 n. 6 *with* Pet. at 19 n. 7 & *id.* at 27.

reconfiguration of state procedure effected by the new reforms resulted from careful long-term study initiated well before the *Ashmus* rulings and, indeed, well before passage of the AEDPA. *See generally Hill v. Butterworth*, 941 F.Supp. at 1159 attach n. 16 ("Shevin Report" (Feb. 26, 1996))(citing information provided by the Executive Director of the California Appellate Project). Of course, with reform, not regression, being its overarching objective, the legislature naturally avoided any changes that would take the state *out* of compliance with Chapter 154. The exacting care with which that objective was fulfilled provides no evidence of earlier non-compliance.

Moreover, because application of Chapter 154 to federal proceedings "should be determined by examining [the state mechanism] as it existed at the time a petitioner first received appointment of counsel in the [state] post-conviction process," *Wright v. Angelone*, 944 F.Supp. 460, 463 (E.D. Va. 1996), California's new reforms can have no effect on the vast majority of its current death row population; rather, it is the decision in *this* case that will define "the law governing [the] federal habeas proceedings" of no fewer than 370 state prisoners whose counsel were appointed under the unitary review procedures employed in California since 1989. *See* Opp. at 5-6 & n. 4. Correct construction and application of Chapter 154 is clearly a matter of national importance, and nowhere is it more important than in this case.

C. *The Injunction on All Future Advocacy by the State*

Although the "All Writs Act" played no part whatsoever in the decisions of the district or circuit courts, respondent now identifies it as the basis for the judgment enjoining state officials from so much as *expressing* their views on an important question of law presented in approximately 109 habeas proceedings pending in other

district courts throughout California or on appeal to the Ninth Circuit. Opp. at 20; *see id.* at 5 n. 4. The effort fails.

The All Writs Act authorizes the issuance of "such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States v. New York Telephone Co.*, 434 U.S. 159 (1977). The district court here had jurisdiction to resolve any *habeas* proceeding *respondent* might have wished to bring and, in the course thereof, to determine any questions of law concerning application of Chapter 154, but it never "otherwise obtained" jurisdiction over other habeas proceedings pending before different courts of co-equal or greater dignity. Respondent's separately-filed class action "civil rights" suit is barred by the Eleventh Amendment, and enjoining state officials from expressing their views in other proceedings was not necessary to prevent "frustration" of any ruling the district court might issue in *respondent's* habeas action. Indeed, the availability of ordinary habeas procedure to decide Chapter 154's application having now been conceded, the utter *impropriety* of respondent's reliance on the All Writs Act is also manifest: "Although the Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34, 43 (1985).

Respondent can identify no circumstances warranting the Ninth Circuit's continued interference with the constitutional rights and duties of state officials. State officials' ongoing advocacy in other cases neither threatens to deprive the district court of its jurisdiction over respondent's habeas claims nor jeopardizes that court's

ability to "enforce" or "facilitate" any voluntary "settlement" of his habeas action. *Compare* Opp. at 20 & authorities string-cited therein. State officials also have never "forced" any habeas petitioner "in and out of" federal court or otherwise "abused the court system." *Compare, e.g., United States v. Harrelson*, 613 F.2d 114, 116 (CA5 1980), *cited in* Opp. at 20. Finally, state officials are not demanding that "the doors of every courtroom in the land be open to them." *Compare Airlines Reporting Corp. v. Barry*, 825 F.2d 1220, 1224 (CA8 1987), *quoted in* Opp. at 21. Rather, we seek restoration of our right to be *heard* on issues of consequence to the adjudication of attacks on state criminal judgments. The right to "raise all legal issues, even if they have been decided adversely . . ., in order to preserve them for future review," *Hill*, 941 F.Supp. at 1158, does not exist for the benefit of everyone except the state.

Respectfully submitted,

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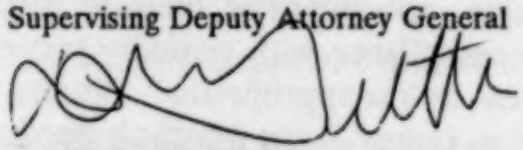

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